

ERNESTINE M. SMITH, ET AL.

v.

AREA DIRECTOR, MUSKOGEE AREA OFFICE, BUREAU OF INDIAN AFFAIRS

IBIA 87-31-A

Decided June 21, 1988

Appeal from a decision of the Muskogee Area Director, Bureau of Indian Affairs, reversing a decision of the Osage Agency Superintendent concerning distribution of 2.00 Osage headrights which were devised by will.

Affirmed as modified.

1. Administrative Procedure: Decisions--Indian Probate: Indian Tribes:
Osage Indians: Osage Headrights

In determining whether a change in law or in the interpretation of law should be given retroactive effect, the Board of Indian Appeals will consider: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose.

APPEARANCES: Robert E. Martin, Esq., Tulsa, Oklahoma, for appellants; Cecil O. Wood, Esq., Field Solicitor, U.S. Department of the Interior, Pawhuska, Oklahoma, for appellee; Mary Maywalt, Esq., Denver, Colorado, for Joe and Irene Miyamoto.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

By memorandum dated March 16, 1987, the Assistant Secretary--Indian Affairs referred the above case to the Board of Indian Appeals (Board) for decision pursuant to 25 CFR 2.19(a)(2). 1/ The appeal had been filed

1/ Section 2.19 states in pertinent part:

“(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs [or Bureau of Indian Affairs official exercising the administrative review authority of the Commissioner] shall:

“(1) Render a written decision on the appeal, or

“(2) Refer the appeal to the Board of Indian Appeals for decision.”

with the Washington, D.C., office of the Bureau of Indian Affairs (BIA) under 25 CFR Part 2. Appellants Ernestine M. Smith, Charles C. Mongrain, Coenia M. Morgan, Louise Carter Mongrain, George E. Mongrain, Jr., Caroline Mongrain Meinzer, and Charles E. Mongrain seek review of a September 10, 1986, decision issued by the Muskogee Area Director (appellee), BIA. That decision reversed a decision of the Osage Agency Superintendent (Superintendent) concerning distribution of 2.00 Osage headright interests which were devised by the will of John W. Ellis, an unallotted Osage Indian (decendent). For the reasons discussed below, the Board affirms that decision as modified in this opinion.

Procedural Background

Decendent died on November 14, 1980, having executed a will dated September 30, 1980. Pursuant to 25 CFR Part 17, evidence relating to the approval or disapproval of decendent's will was presented to the Field Solicitor, Pawhuska, Oklahoma, as special attorney for the Osage Indians. Based on the evidence presented, the Field Solicitor found that the will was properly executed in accordance with the laws of the State of Oklahoma, the decendent possessed testamentary capacity and there was no evidence that fraud, duress, coercion, or undue influence had been exerted upon the decendent.

The Field Solicitor further found that decendent had devised 2.00 Osage headrights to Joe and Irene Miyamoto as joint tenants with right of survivorship. Neither Joe nor Irene Miyamoto is an Osage Indian. Accordingly, the Field Solicitor found that this devise was subject to section 7 of the Act of October 21, 1978, P.L. 95-496, 92 Stat. 1660, 1663 (1978 act), which limits to a life estate any devise of an Osage headright to a person not of Osage Indian blood. 2/

By memorandum dated December 14, 1981, the Field Solicitor recommended that the Superintendent approve the will, subject to the limitations of section 7 of the 1978 act. By order also dated December 14, 1981, the Superintendent accepted the Field Solicitor's recommendation and approved the will subject to section 7. No appeal was taken from this decision. 3/

2/ Section 7 states in pertinent part:

"After passage of this Act, a person not of Osage Indian blood * * * is prohibited from receiving more than a life estate in an Osage headright interest owned by an Osage Indian * * * whether such estate is received by will, inter vivos trust, or Oklahoma law of intestate succession."

3/ Rights of appeal from decisions of the Superintendent concerning an Osage will are set forth in 25 CFR 17.14:

"(a) Notwithstanding the provisions of Part 2 of this chapter concerning appeals generally from administrative actions, any appeal from the action of the superintendent approving or disapproving a will shall be taken to the Secretary. * * *

"(b) Any party desiring to appeal from the action of the superintendent shall, within 15 days after the date of the mailing of notice of the decision file with the superintendent a notice in writing of his intention to

Pursuant to statutory authority contained in the Act of April 18, 1912, ch. 83, section 3, 37 Stat. 85, as amended by § 5(b) of the 1978 act, 4/ and subject to the limitations contained in sections 5(a) and (d) of the 1978 act, 5/ the Superintendent's decision was presented to the District Court of Osage County, Oklahoma. The district court entered an order on October 2, 1985, approving decedent's will, and reducing the fee simple interest devised to the Miyamotos to a life estate with the remainder in decedent's heirs of Osage blood, appellants here. In the Matter of the Estate of John W. Ellis, Unallotted Osage, No. P-82-10. According to appellee's brief at page 7, this reduction of the interest

fn. 3 (continued)

appeal to the Secretary, and shall, within 30 days after the mailing date of such notice by the superintendent, perfect his appeal to the Secretary by service of the appeal upon the superintendent who will transmit the entire record to the Secretary. If no notice of intention to appeal is given within 15 days, the superintendent's decision will be final."

The Secretary has delegated his review authority to the Solicitor of the Department, 209 DM 3.2A(3)(a), who has, in turn, redelegated this authority to the Tulsa Regional Solicitor, 1 SRM 1.9.1. Under section 5(a) of the 1978 act, the Regional Solicitor's decision is subject to judicial review only in Federal court, not in the Oklahoma district court.

4/ Section 3 of the 1912 act provided in pertinent part: "That the property of deceased * * * allottees of the Osage Tribe, * * * shall, in probate matters, be subject to the jurisdiction of the county courts of the State of Oklahoma."

Section 5(b) of the 1978 act provides: "Section 3 of the Act of April 18, 1912 (37 Stat. 86), is hereby amended to read as follows: 'That the property of deceased * * * Osage Indians * * * shall, in probate matters, be subject to the District Court of Oklahoma having jurisdiction * * *.'"

5/ Relevant portions of section 5 are:

"(a) Section 8 of the Act of April 18, 1912 (37 Stat. 86, 88), is hereby amended to read as follows: 'Any person of Osage Indian blood, eighteen years of age or older, may dispose of his Osage headright or mineral interest and the remainder of his estate (real, person[al], and mixed, including trust funds) from which restrictions against alienation have not been removed by will executed in accordance with the laws of the State of Oklahoma: Provided, That the will of any Osage Indian shall not be admitted to probate or have any validity unless approved after the death of the testator by the Secretary of the Interior. The Secretary shall conduct a hearing as to the validity of such will at the Osage Indian Agency in Pawhuska, Oklahoma. * * * No court except a Federal court shall have jurisdiction to hear a contest of a probate of a will that has been approved by the Secretary. Such appeals shall be on the record made before the Secretary and his decisions shall be binding and shall not be reversed unless the same is against the clear weight of the evidence or erroneous in law.'

* * * * *

"(d) Notwithstanding the provisions of subsections (a), (b), and (c) of this section, disposition of any Osage headright or mineral interest shall be subject to the provisions of section 7 of this Act."

devised to the Miyamotos was consistent with the district court's longstanding interpretation of section 7. Again, no appeal was taken from this decision.

However, by memorandum dated April 17, 1986, the Superintendent advised the parties to decedent's estate that the

portion of said Order [of the district court] distributing 2.00000 Osage headrights to Joe and Irene Miyamoto, jointly, and to the survivor for the lifetime of the survivor, cannot be approved by virtue of In the Matter of the Will of Martha Ann Willis, IA-T-42 (February 21, 1985). [6/] Therefore, a Nunc Pro Tunc Order should be obtained distributing said 2.00000 Osage headrights to the heirs of Osage Indian blood of John W. Ellis, in equal shares.

(Memorandum at 2). The Superintendent advised the parties that they had the right to appeal this decision pursuant to 25 CFR Part 2.

The Miyamotos timely appealed the decision to appellee and filed a brief in support of the appeal. Present appellants elected not to file a brief before appellee.

By letter dated September 10, 1986, appellee reversed the Superintendent's decision. Appellee concluded:

The Superintendent's order approving the Ellis Will and the State District Court's final Probate Order are final, binding decisions; therefore, the decision of the Osage Agency Superintendent issued April 17, 1986, is hereby reversed, and he is directed to distribute the estate in accordance with his Order dated December 14, 1981, and the Order of the District Court of Osage County, Oklahoma, dated July 12, 1985.

Present appellants filed an appeal with the BIA Washington office in accordance with the provisions of 25 CFR Part 2. Briefs were filed by appellants and the Miyamotos. By memorandum dated March 16, 1987, the Assistant Secretary--Indian Affairs transferred the appeal to the Board. Additional briefs were filed with the Board by appellants and the Miyamotos.

By order dated August 3, 1987, the Board requested a brief from appellee under 43 CFR 4.311(c), which states that "[t]he Bureau of Indian Affairs shall be considered an interested party in any proceeding before the Board. The Board may request that the Bureau submit a brief in any case before the Board." Appellants filed an additional brief in response to appellee's brief.

6/ This decision of the Tulsa Regional Solicitor, discussed infra, held that a devise of Osage headrights to a non-Osage failed entirely because the Department lacked authority to reduce a fee simple interest to a life estate.

A Brief History of Osage Headrights

The history of Osage headrights and their devisability is recounted by the Tulsa Regional Solicitor at pages 2-3 of his Willis decision:

Osage headrights are unique to the Osage Tribe, and have their genesis in the Osage Allotment Act of April 28, 1906, 34 Stat. 539. In that Act Congress directed that a membership roll be prepared for the Osage Tribe, and that land owned by the Tribe be allotted in severalty to the enrolled members. The 1906 Act authorizes allottees, under certain conditions, to alienate the surface interest in their land; title to the subsurface mineral interests in all lands allotted, however, was severed and reserved to the Tribe with the provision that income earned by this Tribal mineral estate be held in trust by the United States for the use and benefit of the Tribe and the enrolled members for a period of twenty-five years. Successive acts of Congress extended the term of the trust management by the United States, and under Section 2 of the 1978 Act the federal trust was extended "in perpetuity."

The Tribal roll of members was closed in 1906, and this roll is the permanent basis for the per capita distribution to the allottees and their heirs of Tribal income and property, including the income earned by the severed subsurface mineral estate. The right of the enrolled members to receive the per capita distribution of Tribal property and income came to be called an "Osage headright." F. Cohen, Handbook of Federal Indian Law, 790-791 (1982 ed.). Although there have been minor variations in usage of the term "headright," the 1978 Act equates the term with the individual right of enrolled members of the Osage Tribe and their heirs to share in the per capita distribution of the income earned by the Tribe's mineral estate. Id. at 791 n. 192.

The 1906 Act did not authorize the alienation of headright interests, providing under section 6 that headright interests of deceased allottees descend to their legal heirs. Under Section 8 of the 1912 Act Osage Indians, for the first time, were granted the power to make disposition by will of their headright interests, providing that such disposition was to be "in accordance with the laws of the state of Oklahoma," and that the wills were subject to approval by the Secretary of the Interior. The will making power granted to Osage allottees and their heirs was not limited, and under Section 8 they were empowered to bequeath their Osage headright interests to Indians and non-Indians without restriction.

Congress discarded the relatively simple testamentary procedure contained in Section 8 of the 1912 Act by enactment of the 1978 Act. The 1978 Act provided a new statutory scheme which, under Section 5(a), reaffirms the will making power granted to Osage Indians to make testamentary disposition of their headright

interests “by will executed in accordance with the laws of the State of Oklahoma.” Section 5(a) for the first time requires that the Secretary conduct a hearing to determine the validity of each will. Under Section 7 of the 1978 Act, however, Congress limited the will making power granted to Osage Indians by providing that “a person not of Osage Indian blood . . . is prohibited from receiving more than a life estate in an Osage headright interest owned by an Osage Indian . . . whether such interest is received by will, inter vivos trust, or Oklahoma law of intestate succession.” The legislative history of the 1978 Act discloses that Congress intended to provide a means of garnering Osage headright interests back into Osage Indian ownership. Both the Report of the House and the Report of the Senate state that Section 7 “is intended to provide a means of keeping the Osage headright or mineral interest in Osage Indian ownership.” H. R. Rep. No. 95-1459, 95th Cong., 2d Sess. 4 (1978); S. Rep. No. 95-1157, 95th Cong., 2d Sess. 8 (1978).

Issue on Appeal

Because of the statutory and regulatory scheme established for consideration of Osage wills, the Board does not have jurisdiction to consider the merits of the Regional Solicitor's decision in Willis, *supra*. Instead, the only issue over which the Board has jurisdiction is whether the Superintendent properly applied the Regional Solicitor's decision in Willis retroactively to a case which the Superintendent had decided more than three years earlier. 7/

Discussion and Conclusions

The answer to the question before the Board requires an analysis of the body of law concerning the retroactive application of changes in the law or in interpretations of the law.

[1] The Board discussed the retroactive application of changes in the law in Estate of Nellie Brown, 11 IBIA 1 (1982). 8/ Noting that its analysis followed Solicitor's Opinion, 84 I.D. 54, 62 (1976), 9/ the Board stated that the courts have looked to four factors in determining whether a change in law should be given retroactive effect: (1) the nature of the reliance placed upon the prior applications of law by the parties; (2) the harm or prejudice to those who relied upon previous principles of law; (3) the purpose of the law in light of public policy; and (4) the harm to the administration of justice or public purpose. Linkletter v. Walker, 381 U.S. 618

7/ Although Ellis was still pending in the district court when the Willis decision was issued, the Superintendent's involvement in Ellis was concluded on Dec. 14, 1981. Willis was not decided until Feb. 21, 1985.

8/ In Brown, the Board declined to apply a 1977 change in Oklahoma State law to an intestate probate decision rendered in 1963.

9/ This Solicitor's opinion was approved by the Secretary.

(1965); 10/ Retail, Wholesale and Department Store Union v. National Labor Relations Board, 466 F.2d 380 (D.C. Cir. 1972); 11/ Safarik v. Udall, 304 F.2d 944 (D.C. Cir.), cert. denied, 371 U.S. 901 (1962). 12/

The first factor to be considered in determining whether the Willis decision should be applied retroactively is the nature of the reliance placed upon the prior law by the parties. It appears likely in this case that all present parties relied upon the Department's prior interpretation of section 7 when they failed to appeal the Superintendent's decision. It is also possible that decedent, who has a significant surviving interest in the outcome of this matter, 13/ relied upon the Department's interpretation in writing his will in 1980, after the passage of the 1978 act. 14/ Reliance upon the prior interpretation of law appears to be substantial.

The second factor is the harm or prejudice to those who relied upon previous principles of law. The harm to the Miyamotos should this decision

10/ In Linkletter, 381 U.S. at 629, after determining that retroactive application of changes in the law was neither required nor prohibited, the Court stated: "[W]e must then weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."

11/ The court in Retail, Wholesale and Department Store Union, 466 F.2d at 390, set forth five factors to be considered in determining whether a newly adopted administrative rule should be given retroactive effect:

"(1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard."

12/ In Safarik, 304 F.2d at 950, the court stated that a decision may be limited to prospective application "where persons have contracted, acquired rights, or acted in reliance on the prior decision, and the operation of the later decision retrospectively would result in substantial harm to such persons."

13/ See Hodel v. Irving, 481 U.S. 704, 107 S. Ct. 2076, 2081 (1987). In discussing standing to bring a challenge to the escheat provisions of section 207 of the Indian Land Consolidation Act, as originally enacted, 25 U.S.C. § 2206 (Supp. I, 1983), the Court noted that the property rights allegedly being taken were those of the decedents, not of the plaintiffs, stating "[f]or obvious reasons, it has long been recognized that the surviving claim of a decedent must be pursued by a third party."

14/ Although admittedly speculative, it is possible that by devising a fee simple interest to the Miyamotos while relying on the Department's interpretation of section 7 of the 1978 act to reduce that interest to a life estate, decedent could have intended to devise the greatest interest legally possible in the headrights to the Miyamotos. This interest might have been greater than a life estate if section 7 had been amended before decedent's death.

be retroactively applied is significant in that they would lose all benefit of the headrights which decedent attempted to devise to them. ^{15/} The harm to decedent is also significant because his intent with respect to the disposition of his headrights would be entirely frustrated.

The third factor is the purpose of the law in light of public policy. As stated in Willis, the Regional Solicitor was there attempting to more closely effectuate his understanding of the Supreme Court's decision in Tooahnippah v. Hickel, 397 U.S. 598 (1970). Tooahnippah holds that, in approving and disapproving Indian wills, the Department does not have the authority to rewrite a will that evidences a rational testamentary scheme merely because the Departmental official considering the will does not approve of the disposition. In Willis the Regional Solicitor concluded that (1) section 7 was an absolute statutory prohibition against an Osage Indian's devising more than a life estate interest in a headright to a non-Osage, ^{16/} and (2) by reducing a devised fee interest to a life estate, the Department was rewriting the decedent's will in order to validate a devise that was statutorily prohibited:

By this extension of his order [to reduce the fee interest] the Superintendent attributed to the Testatrix an intent to change her will; an intent to select a life estate as a substitute for the fee simple bequeathed from among the various other lesser estates which could have been selected (e.g., an estate for years); and an intent to select her Osage heirs under Oklahoma law as remaindermen to this life estate from among other persons of Osage Indian blood who would be eligible, including members of her family and friends.

(Willis at 5). The public policy purpose sought to be effected by the change in the interpretation of law is an important consideration.

The final factor to be considered is the harm to the administration of justice or public purpose. Any harm caused by the failure to apply the

^{15/} The Board declines to address appellants' argument that because section 7 of the 1978 act speaks of a "life estate," in the singular, it is impermissible to create a life estate in more than one person with a right of survivorship. The construction of section 7 in this context is not within the Board's review jurisdiction.

^{16/} This is the real point of change in the Departmental interpretation of section 7. Before Willis, the Department had viewed section 7 as a limitation on the non-Osage beneficiary's right to receive the headright interest, rather than an the Osage testator's right to devise the interest. The reduction of an interest greater than a life estate to a life estate was thus viewed as the means for giving as much effect as possible to the testator's intent within the strictures of the statutory scheme. By construing section 7 as a restriction on the Osage testator, the attempted devise became one in excess of the statutory right of testamentary disposition, which, therefore, totally failed, forcing the interest to pass by intestate succession.

changed interpretation of law retroactively would be that resulting from the Department's possible failure to properly follow the Supreme Court's guidance in Tooahnippah. Failure to properly apply a Supreme Court decision is a significant consideration. This consideration is, however, tempered by the fact that the prior interpretation had apparently been consistently followed since enactment of the 1978 act. The Board does not know how many Osage wills were subject to this interpretation of section 7 from 1978 until the Willis decision in 1985. Appellee states at page 3 of his brief that the interpretation was applied "to numerous Osage wills prior to and subsequent to the decision in Ellis." The Board assumes that the interpretation was applied in more than one case.

Therefore, the determination of whether the Willis decision should be retroactively applied depends upon whether the reasonable expectations of the parties, especially the Miyamotos, that the Department's prior interpretation of section 7 of the 1978 act as allowing a fee simple devise of an Osage headright to be reduced to a life estate, should be defeated by the Department's present understanding of the requirements of Tooahnippah. Based upon the following considerations, the Board believes that the detriment caused by applying the old interpretation of law is less than the hardship that would be caused by application of the new law, and that the retroactive application of the Willis decision was, therefore, inappropriate.

Willis represents a radical change from prior Departmental practice in that it totally invalidates a devise greater than a life estate, thus effectively cutting out any devise of the headright to the testator's intended non-Osage beneficiary. ^{17/} Retroactive application of this interpretation would allow the testator in prior cases, such as the present one, no opportunity to alter his or her will in order to conform to the new interpretation of law.

This fact presents problems similar to those noted in the concurring opinion of Justices Stevens and White in Irving, *supra*. In Irving the Court discussed the constitutionality of the original escheat provisions of section 207 of the Indian Land Consolidation Act, 25 U.S.C. § 2206 (Supp. I, 1983). Under this section, certain small fractional interests in Indian trust or restricted land could not be devised or inherited, but escheated to the tribe. Justice Stevens noted that although there was a legitimate Governmental interest in controlling the devise of certain fractional interests in Indian trust or restricted property, that interest did not "lessen the importance of giving a property owner fair notice of a major change in the rules governing the disposition of his property," 481 U.S. at ___, 107 S. Ct. at 2089, and stated prior case law had established that a "grace period" which allowed property owners a chance to conform their actions to the change in law, was a necessary part of any escheat statute.

^{17/} See note 11, *supra*.

The Board expresses no opinion as to the appropriateness of this interpretation of section 7 in light of Tooahnippah. As noted *supra*, the Board does not have review authority over decisions on the approval or disapproval of Osage wills.

Admittedly, the loss of control over the disposition of property in Irving is greater than that at issue here, since in Irving, failure to conform to the statutory enactment resulted in the complete loss of the fractional interest to the tribe, while here, failure merely changes the intended beneficiary to a perhaps unintended heir or heirs. Retroactive application, however, still allows the testator, who is by definition deceased, no opportunity to conform his or her conduct to the change in law. 18/ Under the circumstances, the Board holds that retroactive application of such a drastic change in the Department's interpretation of section 7 of the 1978 act would be inappropriate.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the September 10, 1986, decision of the Muskogee Area Director is affirmed as modified in this opinion.

Kathryn A. Lynn
Chief Administrative Judge

I concur:

Anita Vogt
Administrative Judge

18/ In contrast, the Board has been informed that the Department has undertaken an extensive program of informing Osage Indians about the Willis decision so that they can conform their conduct with the new interpretation of section 7, should they so desire.